

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6003

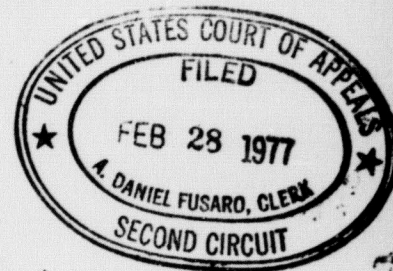
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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service,
Petitioners-Respondents,

vs.

ASPHALT MATERIALS, INCORPORATED,
CHARLES HALL, President,
Respondents-Appellants.



B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

APPENDIX FOR RESPONDENTS-APPELLANTS

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& GREGG,
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Buffalo, New York 14202,
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CHARLES H. DOUGHERTY, *of Counsel.*

PAGINATION AS IN ORIGINAL COPY

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special
Agent, Internal Revenue
Service,

Petitioners

v.

ASPHALT MATERIALS, INCORPORATED and CHARLES HALL,
President,

Respondents

Misc Civ 76-87

CIVIL ACTION NO.

Order to Show Cause.

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent Dennis J. Herzog, Internal Revenue Service, and upon motion of Richard J. Arcara, United States Attorney for the Western District of New York, it is

ORDERED that Asphalt Materials, Incorporated, and Charles Hall, president, appear before the United States District Court for the Western District of New York, in that branch thereof presided over by the undersigned, on the 1st day of November, 1976, at 9:00AM to show cause why they should not be compelled to obey the Internal Revenue Service summons served upon them on April 8, 1976. It is further

ORDERED that a copy of this order, together with the petition and exhibit thereto, be served personally upon Asphalt Materials, Inc., and Charles Hall, president, on or before October 22nd, 1976. It is further

Order to Show Cause.

ORDERED that the respondents, Asphalt Materials, Inc., and Charles Hall, president, shall file a written response to the petition within five (5) days after service of the petition upon them.

Dated at Buffalo, New York, this 14th day of October, 1976.

JOHN T. ELFVIN
UNITED STATES DISTRICT JUDGE

Petition to Enforce Internal Revenue Service Summons.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and
DENNIS J. HERZOG Special
Agent, Internal Revenue
Service,

Petitioners

v.

ASPHALT MATERIALS, INCORPORATED and CHARLES HALL,
President,

Respondents

CIVIL ACTION NO.

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Now come the United States of America and Special Agent Dennis J. Herzog, Internal Revenue Service, by their attorney, Richard J. Arcara, United States Attorney for the Western District of New York, and show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§7402(b) and 7604(a), to judicially enforce an Internal Revenue Service summons.

II

The petitioner, Dennis J. Herzog, is a special agent of the Internal Revenue Service employed in Buffalo, New York, and is authorized to utilize Internal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602, and Treasury Regulation §301.7602-1, 26 C.F.R. §301.7602-1.

4
Petition to Enforce Internal Revenue Service Summons.
III

The respondent, Asphalt Materials, Incorporated, is a New York corporation with offices at 141 Fillmore Avenue, Buffalo, New York, within the jurisdiction of this Court. The respondent, Charles Hall, is president and majority shareholder of the respondent, Asphalt Materials, Inc., also with offices at 141 Fillmore Avenue, Buffalo, New York.

IV

The petitioner, Special Agent Dennis J. Herzog, is conducting an investigation of the federal income tax liabilities of the respondent, Charles Hall, for the calendar years 1972, 1973 and 1974.

V

The respondent, Asphalt Materials, Inc., and Charles Hall, president, have books, records, papers and information all of which relate to the tax liabilities under investigation by the petitioner, Special Agent Dennis J. Herzog.

VI

On April 8, 1976, a summons was issued by the petitioner, Special Agent Dennis J. Herzog, directing the respondents, Asphalt Materials, Inc., and Charles Hall, president, to appear before the petitioner, Special Agent Dennis J. Herzog, on April 19, 1976 at 10 a.m. to testify and to produce for examination certain corporate books, records and papers, all as set forth in the attached affidavit and summons. An attested copy of the summons was served upon the respondents, Asphalt Materials, Inc., and Charles Hall, president, by the petitioner, Special Agent Dennis J. Herzog, on April 8, 1976, by handing it to Charles Hall. The summons issued to the respondents, Asphalt Materials, Inc., and Charles Hall, president, is attached hereto and incorporated herein as Exhibit 1.

Petition to Enforce Internal Revenue Service Summons.**VII**

The respondents, Asphalt Materials, Inc., and Charles Hall, president, failed to appear in response to the summons issued to them or to testify or produce the corporate books, records and papers as required by the summons and such failure continues to the date of this petition.

VIII

The testimony and corporate books, records and papers sought by the summons issued to the respondents, Asphalt Materials, Inc., and Charles Hall, president, are not already in the possession of the Internal Revenue Service and no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

IX

It was and now is essential to the determination of the tax liabilities of the taxpayer, Charles Hall, for the calendar years 1972, 1973 and 1974 that Asphalt Materials, Inc., and Charles Hall, president, be required to provide testimony and produce the records demanded, as is evidenced by the affidavit of the petitioner, Special Agent Dennis J. Herzog, attached hereto and incorporated herein as part of this application.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents, Asphalt Materials, Inc., and Charles Hall, president, to show cause, if any they have, why they should not comply with and obey the aforementioned summons in each and every requirement thereof.

2. That the Court enter an order directing the respondents, Asphalt Materials, Inc., and Charles Hall, president, to obey the aforementioned summons and each and every requirement thereof, and ordering their attendance and testimony and the production of the books, records and papers as required and called for by

Petition to Enforce Internal Revenue Service Summons.

the terms of the summons, before Special Agent Dennis J. Herzog, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Dennis J. Herzog, or any proper officer of the Internal Revenue Service.

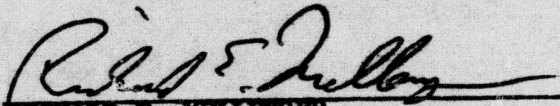
3. That the United States recover its costs in maintaining this action.

4. That the Court render such other and further relief as is just and proper.

DATED: Buffalo, New York, October 14, 1976.

RICHARD J. ARCARA
United States Attorney

By:


RICHARD E. MELLENGER
Assistant United States Attorney

Summons



Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of

Charles Hall
192 Whitfield Ave
Buffalo, NY 14220

Internal Revenue District of Buffalo, NY

Period(s) 1972 through 1974

The Commissioner of Internal Revenue

To Charles Hall, as president of
Asphalt Materials Corp.
At 141 Fillmore Avenue
Buffalo, New York

Greetings: You are hereby summoned and required to appear before

Dennis J. Herzog

an officer of the Internal Revenue Service, to give

testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

1. Records of all corporate sales whether denominated "sales journals" or by any other name;
2. Records of all corporate cash receipts whether denominated "cash receipts journals" or by any other name;
3. Records of corporate disbursements whether denominated "cash disbursements journals" or by any other name;
4. All bank statements and cancelled checks in the name Asphalt Materials Corp., Inc., or any variation of the corporate name, which reflect transactions, checking account with Manufacturers & Traders Trust Co. for the calendar years 1967 through 1974 and any and all other corporate checking accounts;
5. Profit and loss statements whether denominated as such or by any other name;
6. Balance sheets whether denominated as such or by any other name;
7. Retained copies of all Forms 1120 filed by Asphalt Materials Corp., Inc., whether filed in such name or any variation thereof;
8. Retained copies of all Forms 941 and 940 filed by Asphalt Materials Corp., Inc., whether filed in such name or any variation thereof.
9. Records requested in Items 1 through 8 above for periods 1967 through 1974.

Place and time for appearance:

at Intelligence Division, Rm. 516, Fed. Bldg., 111 W. Huron St., Buffalo, NY

on the 19th day of April, 19 76 at 10: o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States

commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 8th day of April, 19 76

Original

EXHIBIT 1

Signature

Dennis J. Herzog

Special Agent

Title

Tel: 842-3418

Form 2039 (Rev. 2-74)

8
Exhibit 1 Attached to Petition.

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)



I certify that I served the summons shown on the front of this form on:

Date <u>April 8, 1976</u>	Time <u>10:08 AM</u>
------------------------------	-------------------------

How ☒ I handed an attested copy of the summons to the person to whom it was directed.

Summons Charles Hall, was president of

Was Asphalt Materials Corp

Served ☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature <u>Thomas J. Herzog</u>	Title <u>Special agent</u>
--------------------------------------	-------------------------------

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

EXHIBIT 1

Affidavit of Dennis J. Herzog Attached to Petition.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and)
DENNIS J. HERZOG, Special)
Agent, Internal Revenue)
Service,)

Petitioners)

v.)

ASPHALT MATERIALS, INCORPO-)
RATED and CHARLES HALL,)
President,)

Respondents)

-CIVIL ACTION NO.

A F F I D A V I T

DENNIS J. HERZOG, a petitioner herein, being first duly sworn, deposes and says:

1. I am a duly commissioned special agent of the Intelligence Division of the Internal Revenue Service with post of duty in Buffalo, New York, and performing my duties under the District Director of Internal Revenue, Buffalo, New York.

2. In my capacity as a special agent I was assigned to investigate the federal income tax liabilities of Charles Hall, 192 Whitfield Avenue, Buffalo, New York, for the calendar years 1972, 1973 and 1974.

3. Charles Hall is the president and majority shareholder of Asphalt Materials, Incorporated, and they have possession and control of the corporate books, records and papers, all of which relate to the tax liabilities under investigation.

4. Pursuant to my investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of 1954, 26 U.S.C. §§7602 and 7603, a summons, Treasury Form 2039, was served upon Asphalt Materials, Inc., and Charles Hall, president, on April 8, 1976, by my personally handing an attested copy of

Affidavit of Dennis J. Herzog Attached to Petition.

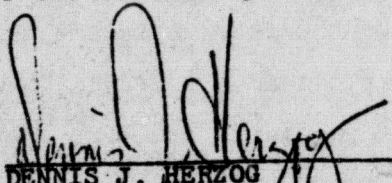
the summons to Charles Hall, president. The summons, which is attached as Exhibit 1 to this application and made a part thereof, required Asphalt Materials, Inc., and Charles Hall, president, to appear before me on April 19, 1976, at 10 a.m. at the Internal Revenue Service Intelligence Division, Room 516, Federal Building, 111 West Huron Street, Buffalo, New York, then and there to give testimony and produce records relating to the tax liabilities of Charles Hall for the calendar years 1972, 1973 and 1974.

5. The respondents, Asphalt Materials, Inc., and Charles Hall, president, failed to appear before me at the time and place directed by the summons served upon them, and such failure continues to the date of this affidavit.

6. The testimony and corporate books, records and papers sought by the summons issued to Asphalt Materials, Inc., and Charles Hall, president, are not already in the possession of the Internal Revenue Service.

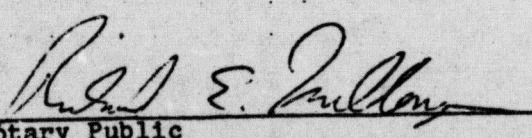
7. No recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

8. The testimony and records demanded by the summons served upon the respondents, Asphalt Materials, Inc., and Charles Hall, president, are necessary for the determination of the tax liabilities of Charles Hall for the calendar years 1972, 1973 and 1974.


 DENNIS J. HERZOG
 Special Agent, Intelligence Division
 Internal Revenue Service

Sworn to and subscribed before me this 12TH day of

October, 1976.


 Notary Public

My commission expires: _____

RICHARD E. MELLENGER
 Notary Public, State of New York
 Qualified in Erie County
 My Commission Expires March 30, 1978

Answering Affidavit of Charles H. Dougherty.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and DENNIS
J. HERZOG, Special Agent, Internal
Revenue Service,

Petitioners

MISC. CIV. 76-87

-vs-

ANSWERING
AFFIDAVIT

ASPHALT MATERIALS, INCORPORATED and
CHARLES HALL, President

Respondents

State of New York)
County of Erie)

Charles H. Dougherty being duly sworn deposes and
says:

1. That I am an attorney at law; an attorney for the respondents in the above captioned proceeding and I am fully familiar with the matters referred to in petitioners moving papers.
2. This affidavit, and supporting exhibits, is made in opposition to the application of the petitioner.
3. That according to the petition this proceeding has been commenced to obtain judicial enforcement of an Internal Revenue Service ("IRS") summons directing the respondents to appear before the petitioner, Special Agent, Dennis J. Herzog, to testify and produce certain records. This summons was issued on April 8, 1976. Respondents, through counsel, declined to comply by letter dated April 9, 1976. See attached Exhibit "A".
4. That in fact petitioner, Dennis J. Herzog, issued the summons in the form of Exhibit "B" attached and made a part of this opposing affidavit. This summons was issued on March 12, 1976 and preceded the summons which has been made to appear as the only summons issued, of April 8, 1976.

Answering Affidavit of Charles H. Dougherty.

5. It is further alleged that such summons was issued under the authority of Section 7602 of the Internal Revenue Code ("Code").

6. Section 7602 of the Code permits the use of a summons "for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax - - - or collecting any tax." However, the documents or testimony sought by the summons according to the Code Section must be "relevant or material to such inquiry."

7. That an examination of the petition and the supporting affidavit fails to disclose a single allegation that the documents or testimony sought is relevant or material to the petitioner's purpose.

8. Not only is it not alleged that the documents or testimony sought is relevant or material but not a single fact is stated in the petition or supporting affidavit which could support such a position.

9. The petitioner is content to rest on the meaningless, self-serving and conclusory comment that such testimony and production of records "[W]as and now is essential," (see par. IX of the petition). This is the only statement in the entire petition that even pretends to comply with the requirements of Section 7602 that the documents and testimony sought must be relevant or material. Such language hardly suffices to comply with a statutory requirement calling for a demonstration of solid proof that what is sought is relevant or material.

10. The supporting affidavit of the Special Agent speaking with even less force than the petition simply states in paragraph 8 of the affidavit that the testimony and records are "necessary" - period. No facts are stated to back up this

Answering Affidavit of Charles H. Dougherty.

assertion and so when all is said and done we are left with the bald statements that the testimony and documents are "necessary" and "essential."

11. The lack of substance in the Government's moving papers becomes even more apparent in the light of the instructions found in the "Handbook for Special Agents" on the subject of the issuance of summonses. This handbook not only warns agents such as Agent Herzog of the Code requirements of showing relevancy or materiality but further admonishes that "A reasonable basis for making the inquiry must exist." See "Handbook for Special Agents", Section 267.2(1) and (5).

12. Even further, the Agents Handbook specifically provides the following relative to use of affidavits in summons proceedings (Handbook, Section 268.3(1)):

"To support applications for Court orders directing compliance with a summons, the agent may be requested by the United States Attorney to prepare an affidavit . . . reciting detailed information concerning the nature and purpose of the examination, the testimony and records desired and their relevancy to the examination" (emphasis supplied)

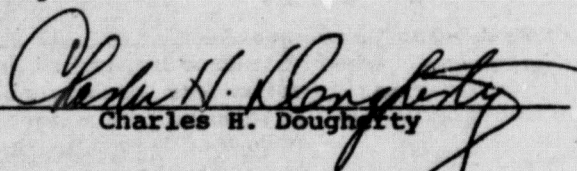
To put it in the most generous terms possible, Agent Herzog's affidavit falls woefully short of these IRS standards.

13. It appears that the Special Agent realized that the original summons was fatal in form and so the general shotgun form of the original summons was transformed into a detailed shotgun form which in either case is too broad and totally unsupported by an "detailed information" as to its relevancy or materiality.

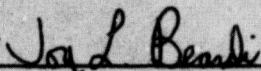
Answering Affidavit of Charles H. Dougherty.

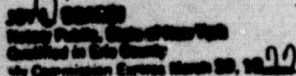
14. Another important fact which the procedure followed by Agent Herzog demonstrates is that the method followed smacks of lack of good faith in the issuance of the summons in the first place. Instead of treating the matter seriously and with the aforethought demanded of someone exercising such a powerful function it was instead treated as something to be whipped out of the agent's arsenal for convenience sake alone.

15. The foregoing amply demonstrates that the petitioner's prayer for relief should be denied because it completely fails to comply with the statutory standards imposed to validate the issuance of a summons; fails to comply with the IRS standards and constitutes a violation of respondents 4th and 5th amendment Constitutional rights.


Charles H. Dougherty

Sworn to before me this
27th day of October 1976




J. L. Bendi
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 28, 1977

BRECHT, MAGUIRE,
EFFERN & GREGG
BUFFALO, N. Y.

Exhibit "A" Attached to Answering Affidavit of Dougherty.

April 9, 1976

CERTIFIED MAIL

Mr. Dennis J. Herzog
Special Agent
Internal Revenue Service
111 W. Huron Street
Buffalo, New York 14202

Re: Charles Hall

Dear Mr. Herzog:

This will confirm our telephone conversation in which I advised you that our client respectfully declines to comply with the summons which you served upon him as President of Asphalt Materials Corp. (sic). As we understand it from you, this latest summons is designed to replace that which was served upon Mr. Hall on March 12, 1976 and in connection with which we wrote to you on March 18, 1976. The grounds of objection to the most recent summons are that it is too broad, that it is not relevant to your investigation, that it was not issued in good faith, that it was issued solely for the purpose of investigating criminal liability, and that it violates the privilege against self-incrimination of both Mr. Hall and the Corporation. The foregoing statement of objections is not intended to be exclusive - others may be raised later.

This will also confirm our understanding that this letter will be acceptable to you in lieu of Mr. Hall's appearance on April 19, 1976 and that such appearance will not be necessary.

Very truly yours,

ALBRECHT, MAGUIRE, HEFFERN & GREGG

GM2:lh

bcc: Charles Hall

Raymond Mercer, CPA

Exhibit "A"

Exhibit "B" Attached to Answering Affidavit of Dougherty.

Form 2039-A
(Rev. 2-74)**Summons**Department of the Treasury
Internal Revenue ServiceIn the matter of the tax liability of
CHARLES HALL
192 Whitfield Avenue
Buffalo, NY 14220Internal Revenue District of Buffalo, NYPeriod(s) 1972 through 1974

The Commissioner of Internal Revenue

To CHARLES HALL, as president of
Asphalt Materials Corp.
At 141 Fillmore Avenue
Buffalo, NY

Greetings: You are hereby summoned and required to appear before

Dennis J. Herzog
an officer of the Internal Revenue Service, to givetestimony relating to the tax liability or the collection of
the tax liability of the above named person for the period(s)
designated and to bring with you and produce for examination
the following books, records, and papers at the place and time
hereinafter set forth:All corporate records including, but not limited to, sales journal, cash receipts
book, cash disbursements book, cancelled checks and bank statements, Corporate
Income Statements, Corporate Financial Statements, and copies of tax returns.
The above records are requested for the years 1967 through and including 1974.

Place and time for appearance:

at IRS, Chief, Intelligence Div., Rm. 516, 111 W. Huron St., Buffalo, NY 14202on the 22nd day of March, 19 76 at 10 o'clock A.M.Failure to comply with this summons will render you liable to proceedings
in the district court of the United States or before a United Statescommissioner or magistrate to enforce obedience to the requirements
of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 12th day of March, 19 76**Attested Copy**Signature Dennis J. Herzog

Special Agent

Title Tel: 716-842-3417

Form 2039A (Rev. 2-74)

Exhibit "B"

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

9128 8 1 JEU

3 -----
4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 -vs-

Misc. Civil 76-87

7 ASPHALT MATERIALS, INC., et al.,

8 Defendant.
9 -----

10 Proceedings held in the above entitled action
11 before the HON. JOHN T. ELFVIN, United States District
12 Judge, in and for the Western District of New York, at
13 Buffalo, New York, on November 1, 1976.

14
15 APPEARANCES:

16 RICHARD J. ARCARA,
17 United States Attorney, by
18 JAMES A. FRONK,
19 Ass't. United States Attorney,
20 Appearing on behalf of the Government.

21 CHARLES H. DOUGHERTY, ESQ.,
22 Appearing on behalf of the Defendants.

23 * * * * *

copy

Transcript of Proceedings, November 1, 1976.

1 CLERK: Miscellaneous Civil 76-87, United
2 States of America, and one, versus Asphalt
3 Materials, Inc., and one.
4 THE COURT: Are you handling this case, Mr. Fronk?
5 MR. FRONK: Yes, I am, your Honor. We have served
6 a standard summons which was not complied
7 with, your Honor, and a letter was sent,
8 and the Government then moved for an order
9 to show cause, served the defendant, request-
10 ing they show cause why the documents should
11 not be produced. Last Thursday, the 28th,
12 I believe, Mr. Dougherty served an answer-
13 ing affidavit on us, opposing the production
14 of the documents. That is where they stand
15 today.
16 THE COURT: Why are you opposing it?
17 MR. DOUGHERTY: Mainly because the law says so, your
18 Honor. They are applying here under Section
19 7602 of the Internal Revenue Code, and I
20 would like to point out to the Court that
21 that code's provisions state that whatever
22 they want has to be relevant and material.
23 Now, if you look through both the petition
24 and the affidavit of the special agent,
25 Agent Herzog, I think your Honor will find

1 that not only don't they use those words,
2 but there is absolutely nothing in there.
3 The one word, and I point out to your Honor,
4 one word appears in the petition in which
5 it says that whatever they are looking for
6 is essential. In the supporting affidavit
7 there is one word, and it says that whatever
8 they are looking for is necessary. Now, I
9 have pointed out, your Honor, in my answer-
10 ing affidavit not only the 7602 requirement,
11 but in Paragraph 12 particularly of the
12 supporting affidavit, I want to bring your
13 Honor's attention to the requirements of
14 the handbook for special agents, which points
15 out what the IRS requirements are relative
16 to matters of this nature, and relative
17 to the application which they are making
18 here. I took the liberty of quoting from
19 the agents' own handbook in Paragraph 12,
20 what is required and what they are expected
21 to produce on an application such as they
22 are making at the present time, and if
23 your Honor will notice, I took the quote
24 right out of the handbook, and I cite the
25 section, and it says that to support appli-

Transcript of Proceedings, November 1, 1976.

1 cations for court orders directing compliance
2 with a summons -- that is what we are here
3 on today -- the agent may be requested by
4 the United States Attorney -- as indeed has
5 been done here -- to prepare an affidavit,
6 and then it goes on to say that in that
7 affidavit the agent should recite -- I
8 underlined the word to supply emphasis --
9 detailed information concerning the nature
10 and purpose of the examination, the testimony
11 and records desired, and their relevance to
12 the examination. Now, as I say in my affida-
13 vit, to put it in its most generous terms,
14 there is absolutely no compliance with
15 Section 7602, which is the law, nor is there
16 any compliance whatever with the handbook
17 instructions to the special agent, and I
18 think Mr. Fronk started off by speaking
19 about the standard summons, it appears to
20 me that this is some sort of a standard
21 application because there is absolutely
22 nothing in here to back up the material they
23 seem to be requesting. If you will notice,
24 your Honor, in looking at their summons, it
25 is addressed to the tax liability of an

1 individual who is the employee of this
2 corporation. Now, they have come forward
3 with nothing here. They have absolutely
4 no supporting data to show what efforts have
5 been made to gather this information other-
6 wise, why it is relevant and material. Pre-
7 sumably, not to make their case for them,
8 but an employee of a corporation, if you want
9 to know what his income is, you find out
10 what they paid him. If it happens to be
11 a closed corporation and there has been
12 dividends issued, that would presumably
13 make up his income in a given year. They
14 go on and ask for all kinds of corporate
15 records, sales, all sorts of irrelevant
16 material. As I say, to answer your Honor's
17 question, as I tried to initially, we are
18 simply here asking that the United States
19 Government comply with the statute, and that
20 the special agent comply with the require-
21 ments of his own handbook. On that basis,
22 your Honor, we take the position that this
23 application on its face is woefully inade-
24 quate, and we ask that it be dismissed.

25 MR. FRONK:

Your Honor, Mr. Hall isn't only an

Transcript of Proceedings, November 1, 1976.

1 employee, he is the president and sole
2 shareholder of a closed corporation. If
3 you read through the summons, all the records
4 which have been subpoenaed, and properly
5 subpoenaed under the section, are relevant
6 obviously to a criminal investigation against
7 Mr. Hall and/or the corporation; and the
8 cases are legion, and Mr. Dougherty well
9 knows the cases are legion. There could
10 hardly be any more relevant and material
11 inquiry when you seek to build a criminal
12 tax case against a president of a company
13 than their sales journals, disbursement
14 journals and corporate records. There is
15 no Fifth Amendment privilege, and Mr. Dougherty
16 has tried to raise that and he hasn't brought
17 it forth at this time, for corporate records
18 to be produced in this case. Your Honor,
19 we can cite cases which show that, as far as
20 the relevance of this investigation, we cite
21 the United States versus Giordano, 419 Fed.
22 2nd 564, cert. denied. There are dozens
23 of cases showing that an inquiry like this
24 on its face is overwhelmingly relevant to
25 any possible tax liability on behalf of the

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Transcript of Proceedings, November 1, 1976.

1 president of this company.

2 THE COURT: On the one hand you are talking about
3 tax liability and, on the other hand, you
4 are talking about criminal prosecution.

5 MR. DOUGHERTY: I would like to raise that question.

6 MR. FRONK: We don't have to go forward, and in
7 all candor, I was telling him there are
8 large possibilities of investigation which
9 are available. All they are doing is send-
10 ing out a standard summons, and they set
11 forth in detail the records they want.

12 THE COURT: All right.

13 MR. DOUGHERTY: I wanted your Honor to take note, which
14 indeed you had, that now they are admitting
15 the basis of this is not the civil liability,
16 as indeed this is a civil procedure at this
17 point, and I would like to have your Honor
18 take note that they now have admitted that
19 they are primarily interested in a criminal
20 prosecution, and in view of that, I would
21 particularly move that the application be
22 dismissed.

23 MR. FRONK: Your Honor, there is no such admission.
24 I am relating to the Court that on the face
25 of the nine demands, on the face of the

Transcript of Proceedings, November 1, 1974.

1 summons, one could get any amount of
2 relevancy and materiality concerning any
3 type of tax investigation concerning those
4 demands. The question was put forth by
5 Mr. Dougherty, we have this individual
6 employee of some company, and all of a
7 sudden you are coming in for the records,
8 and obviously there is no relevance between
9 the production of the records and the
10 legitimate purpose of the summons. We
11 maintain this is manifold from the face of
12 the papers.

THE COURT:

13 If the IRS were oriented toward a
14 criminal prosecution in this case, Mr.
15 Dougherty says he wants me to take note
16 of that and on that basis dismiss or quash
17 the summons. What is your position on that?

MR. FRONK:

18 Your Honor, any possible criminal
19 purpose which may be raised as a defense
20 to this has been set aside by the Supreme
21 Court in Donaldson versus United States,
22 400 U.S. 517, wherein when we have legitimate
23 reason for producing records, and we have
24 properly stated the reason and can legally
25 produce them, then as an offshoot any possible

Transcript of Proceedings, November 1, 1976.

1 criminal prosecution cannot be used as a
2 defense to the production of those records.
3 An analogous argument is someone who would
4 plead the Fifth Amendment when corporate
5 records are subpoenaed, saying, 'I may be
6 incriminated by them.' It has no protection
7 over the corporate records, and that is just
8 an offshoot.

9 THE COURT: I am wondering, and I am just assuming
10 that criminal aspects are not merely an
11 offshoot but really are the sole IRS purpose,
12 what is your position on the duties of the
13 corporation to produce its records?

14 MR. FRONK: I am not saying it is the sole purpose.

15 THE COURT: Take my hypothesis.

16 MR. FRONK: Even if it is, we have legitimately
17 called for the production of certain records
18 under this summons as being relevant and
19 material to any type of tax inquiry --

20 THE COURT: Even a tax inquiry that would be a
21 criminal inquiry?

22 MR. FRONK: That is correct, because the summons
23 on its face will allow that.

24 MR. DOUGHERTY: Your Honor, I would like to point
25 out that in keeping with the Donaldson case,

1 and I am very familiar with that ruling,
2 the petition has touched base, if I might
3 put it that way, by putting in a so-called
4 Donaldson statement, which appears in Para-
5 graph 8 of their petition, that there has
6 been no recommendation for prosecution of
7 the taxpayer. I say that Mr. Fronk's
8 admission here, which I must say I admire
9 his candor, although I question whether it
10 is going to support his application, that
11 is, there is obviously all the intent in
12 the world here to proceed with a criminal
13 prosecution at some point, and based on
14 that fact, and based particularly on the
15 admission of Mr. Fronk before this Court
16 in this argument, I take the position that
17 whatever comfort they might ordinarily get
18 out of the Donaldson case is not applicable
19 here, and in view of that, I ask on that
20 basis, your Honor, that the Donaldson case
21 does not apply, and that this motion for the
22 production of these papers be quashed.

23 THE COURT:

Mr. Fronk said before, and I think it
24 is still his position, he hasn't admitted
25 anything in this regard. I pressed him to

Transcript of Proceedings, November 1, 1976.

1 accept my hypothesis and to tell me what his
2 position would be in the light of that
3 hypothesis. But I take it you are not
4 admitting --

MR. FRONK:

5 As Mr. Dougherty is well aware, and
6 I know that the Court is aware, this is the
7 first step maybe out of eight or nine steps
8 prior to any conceivable prosecution, and
9 my admission, if anything, is nothing more
10 than a statement of the obvious, on the face
11 of the summons they are calling for certain
12 financial records relevant into a tax inquiry,
13 into any possible tax liability.

THE COURT:

I will take it as submitted.

MR. DOUGHERTY:

Thank you, your Honor.

* * * * *

I hereby certify that this record is a
true and accurate transcript from my
stenographic notes in this proceeding.

John J. Hark
Official Reporter
U. S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NOV 23 1976

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service

-vs-

Misc. Civ- 76-87

ASPHALT MATERIALS, INCORPORATED
CHARLES HALL, President

SIR: Take notice of an ORDER, of which the within is
a copy duly granted in the within entitled action on the
19th day of November, 1976, and entered in the Office
of the Clerk of the United States District Court, Western
District of New York, on the 22nd day of November, 1976.

Dated: Buffalo, New York

November 22, 1976

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: Richard J. Arcara, Esq.
Attorney for Plaintiff

TO: Charles H. Dougherty, Esq.
Attorney for Defendant

Memorandum and Order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service,

Misc. Civ. 76-87

Plaintiff,

-vs.-

MEMORANDUM

ASPHALT MATERIALS, INCORPORATED
CHARLES HALL, President,

and

ORDER

Defendants.

The Internal Revenue Service ("IRS") petitions this Court for judicial enforcement of an IRS summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602, which authorizes the examination of books and records in order to determine the civil tax liability of any person. Defendants, a corporation and its president, failed to comply with such summons and this Court issued an Order to Show Cause on October 14, 1976. Argument by counsel was heard on November 1, 1976.

In addition to the summons in question issued by the IRS on April 8, 1976, a previous summons was served on March 12, 1976. The later-issued summons apparently was served to overcome the lack of specificity of the items requested to be examined in the initial summons. Defendants, however, do not assert bad faith or harassment in this second effort,

Memorandum and Order.

but attempt only to use the first summons to emphasize the alleged overbreadth of the summons now sought to be enforced.

The defendants first contend that the present enforcement petition does not explicitly allege that the material sought to be examined is "relevant" to an investigation into defendants' civil tax liability. Defendants miss the point. Relevancy is determined by reading the summons itself in light of the purpose and extent of the tax investigation, not by reference to its precise assertion in an enforcement petition. An examination of the summons reveals that the items to be produced are highly relevant to the presently-contemplated civil investigation and are sufficiently delineated and circumscribed to satisfy the standards of Section 7602. See, United States v. Giordano, 419 F.2d 564, 569 (8th Cir. 1969).

Defendants next contend that the purported civil investigation may eventually result in criminal prosecution and this possibility invalidates the instant summons. It is true that Section 7602 only authorizes the issuance of a summons to facilitate a civil investigation. It is well established, however, that such a summons is valid "if it is issued in good faith and prior to a recommendation for criminal prosecution." Donaldson v. United States, 400 U.S. 517, 536 (1971). See also, Black v. United States, 534 F.2d 524 (2d Cir. 1976). A Section 7602 summons is invalid and

Memorandum and Order.

its enforcement properly denied only when the sole purpose of the investigation is to gather evidence for use in a criminal prosecution. Donaldson, supra at 533.

If (1) a recommendation for criminal prosecution has not yet been made, (2) the agent conducting the investigation has not already decided to recommend prosecution, (3) the summons is not being used to harass the taxpayer, and (4) the IRS has not already inspected the books and records listed in the summons, the mere fact that criminal as well as civil liability may follow does not invalidate the summons and it may be judicially enforced. United States v. Friedman, 532 F.2d 928, 932 (3d Cir. 1975).

In the instant case, no recommendation for criminal prosecution has been made, no harassment has been alleged, and the IRS has not yet inspected the books and records to be produced. No evidence has been presented to show that the investigating agent has "already formed a firm purpose to recommend prosecution." See, Friedman, supra at 932. Furthermore, defendants have not affirmatively shown that the sole purpose of the investigation is aimed at criminal prosecution of the taxpayer. While the government concedes that the present civil investigation may eventually lead to criminal prosecution, the mere possibility of criminal liability is not enough to invalidate the instant summons. The likelihood of a criminal prosecution does not bar

Memorandum and Order.

enforcement of a Section 7602 summons so long as a good faith civil investigation of the taxpayer is being conducted.

Therefore, it is

ORDERED that defendants comply with the Internal Revenue Service summons served upon them on April 8, 1976.

Dated: Buffalo, N.Y.
November 19, 1976

S/ John T. Elfin
U.S.D.J.

Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service

Petitioners

-vs-

ASPHALT MATERIALS, INCORPORATED
CHARLES HALL, President

Respondents

NOTICE OF APPEAL

Misc. Civ - 10-87

SIRS:

PLEASE TAKE NOTICE that, Asphalt Materials, Incorporated, Charles Hall, President the respondents in the above captioned hereby appeals to the U. S. Court of Appeals for the Second Circuit from an Order entered in the above entitled action in the office of the Clerk of U. S. District Court on November 22, 1976, ordering the respondents to comply with the Internal Revenue Service summons served upon them on April 8, 1976, and from each and every part of said Order.

Dated: Buffalo, New York
December 20, 1976

YOURS, ETC.

ALBRECHT, MAGUIRE, HEFFERN & GREGG
Attorneys for Respondents

By

Charles H. Dougherty
Charles H. Dougherty, Partner
2110 Main Place Tower
Buffalo, New York 14202

TO: JOHN K. ADAMS, Clerk
U. S. District Court
U. S. Courthouse
Buffalo, New York 14202

RICHARD J. ARCARA, ESQ.
U. S. Attorney
U. S. Courthouse
Buffalo, New York 14202

ALBRECHT, MAGUIRE,
HEFFERN & GREGG
BUFFALO, N. Y.

Certification of Service.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA AND
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service

Petitioners

-VS-

ASPHALT MATERIALS, INCORPORATED
CHARLES HALL, President

Respondents

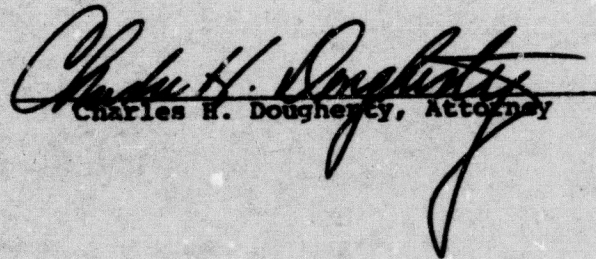
CERTIFICATION OF
SERVICE

Docket No.
C.A. Temp.
No. T-6897

I hereby certify that a copy of Form C and Form D of the United States Court of Appeals for the Second Circuit were served on the Clerk of the United States Court of Appeals for the Second Circuit; on Richard J. Arcara, United States Attorney and Form C on Dennis J. Herzog by first class mail, postage prepaid on December 23, 1976.

Dated: Buffalo, New York
January 4, 1977

ALBRECHT, MAGUIRE,
HEFFERN & ORZOG
BUFFALO, N. Y.


Charles H. Dougherty, Attorney